Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2005

PATRICIA J. SKONIECZNY,

Petitioner

vs.

In Re: CONDEMNATION BY THE ECONOMY BOROUGH MUNICIPAL AUTHORITY of: rights-of-way and easements of certain land situate in the Borough of Economy, for the purpose of the Phase II Project.

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COMMONWEALTH COURT OF PENNSLVANIA

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QUESTIONS PRESENTED FOR REVIEW

1. Did the courts below err by failing to address whether or not the trial court's October 11, 2002 Order was violative of the United States Constitution, the Pennsylvania Constitution and the Eminent Domain Code?

2. Did the courts below err by failing to address whether or not the sufficiency and or existence of a bond can be determined in a settlement mediation conference with the presiding judges acting as the mediator (that the Petitioner was not part of) rather than in an evidentiary hearing?

3. Did the courts below err by failing to address whether or not the Petitioner's procedural and substantive due process rights were violated when the trial court failed to allow the Petitioner to present additional evidence to the security of the bond pursuant to the trial court's October 29th, 2002 Order?

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OPINIONS BELOW

The decision of the Commonwealth Court of Pennsylvania affirming the Order of the Court of Common Pleas of Beaver County's was handed down on October 24th, 2003. (App. at 2.)[1] The Petition for Allowance of Appeal was denied by the Supreme Court of Pennsylvania on April 27, 2004. (App. 1.) The Court of Common Pleas of Beaver County filed an order dated December 17, 2002 (App. 15.); October 29, 2002, (App. 19.); and October 11, 2002 (App. 20.).

JURISDICTION

A final judgment was entered for Economy Borough Municipal Authority by the Court of Common Pleas of Beaver County on December 17, 2003. (App. at 5.) Skonieczny filed a timely appeal to the Commonwealth Court of Pennsylvania on January 16, 2004. The Commonwealth Court had jurisdiction in this case pursuant to 42 Pa. C.S.A. (a) (4) (i) (B) (6).

The Commonwealth Court of Pennsylvania affirmed the final judgment of the Court of Common Pleas of Beaver County on October 24, 2003. A Petition for Allowance of Appeal to the Supreme Court of Pennsylvania was denied on April 27, 2004. The jurisdiction of this Court to review the decision of the Commonwealth Court of Pennsylvania is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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[1] Throughout this petition, the designation "App." refers to the Appendix submitted with this Petition; the designation R.R. refers to the Reproduced Record filed in the Commonwealth Court of Pennsylvania.

AMENDMENT V – GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Economy Borough Municipal Authority started construction of a Phase II Sewer Project sometime in August of 2002. A Declaration of Takings of approximately nine hundred and fifty seven (957) properties out of approximately eighteen hundred and thirty five (1835) homes were filed sometime in May of 2002 without just compensation being made or secured for approximately 927 condemnations. The Commonwealth's affirmation of the Common Pleas October 11, 2002 Order renders the protection of the Fifth Amendment of the United States Constitution obsolete, meaningless and further renders the Fifth Amendment a nullity.

The Petitioner objected to the existence of the Bond of not only the Petitioner's property but also as a taxpayer and future rate payor of the Phase II Project. The lower courts failed to address the issue of the challenged existence of a Bond for any of the Condemnees who were not one of the thirty some preliminary objectors before the court. The Petitioner appealed among other issues the existence of the Bond for all

of the Condemnees in the Phase II Project; the unlawful manner in which the unsecured sum of $500,000.00 of borrowed money was determined as security for the preliminary objectors that were presently before the court[2]; and the fact that the trial court's order was in direct contravention to the Fifth Amendment to the United States Constitution, Article 1, §10 and Article 10, §4 of the Pennsylvania Constitution and 26 P.S. §1-403 (a) of the Eminent Domain Code in that it did not secure just compensation for all of the Condemnees as required by said above statutes.

REASONS FOR GRANTING THE WRIT

I. THE COURTS BELOW FAILED TO ADDRESS WHETHER OR NOT THE TRIAL COURT'S ORDER WAS VIOLATIVE OF THE UNITED STATES CONSTITUTION, THE PENNSYLVANIA CONSTITUTION AND THE EMINENT DOMAIN CODE

One of the issues on appeal was whether the lower court erred as a matter of law and abused its' discretion when the court failed to require the Economy Borough Municipal Authority to post a bond as security for all the Declaration of Takings and instead allowed $500,000.00 of borrowed money to be placed into a Sky Bank account to cover claims of only certain preliminary objectors. (Of which the Petitioner was not part of).

The Bond posted by the Condemnor was a legal fiction and the lower Court's October 11, 2002 Order that was made part of the

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[2] The Petitioner was not one of the preliminary objectors that was part of the settlement conference.

Petitioner's December 17, 2002 Court Order is in direct violation of the following laws:

The Fifth Amendment to the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, not be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article 1, Section 10 of the Pennsylvania Constitution

> provides "in pertinent part"; "[N]or shall private property be taken or applied to public use, without the authority of law and without just compensation being first made or secured."

Article 10, Section 4 of the Pennsylvania Constitution

> provides that "Municipal and other corporations invested with the privilege of taking private property for public use shall make just compensation for property taken, injured or destroyed by the construction or enlargement of their works, highways or improvements and compensation shall be paid or secured before the taking, injury or destruction."

26 P.S. § 1-403 (a) of the Eminent Domain Code

> Bond. Except as hereinafter provided, every condemnor shall give security to effect the condemnation by filing with the declaration of taking its Bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned, the condition of which shall be that the condemnor shall pay such damages as shall be determined by law.

The main crux of the argument with regard to the Bond issue is that the lower court's October 11, 2002 Order clearly provides compensation for only the preliminary objectors that were before the court with the provision that the parties shall "monitor the security as to **future** claims and settlements" and be permitted to Petition the Court for any appropriate modification or adjustment of said cash security during the pendency of the sewer project.

The Order plus the lack of any specific date makes the "security" not yet due, thus in direct violation of the Fifth Amendment to the United States Constitution Article 1, Section 10 and Article 10, Section 4 of the Pennsylvania Constitution, and 26 P.S. § 1-403 (a) of the Eminent Domain Code. Just Compensation must be made or secured **before** the taking.

The lower court's order suggests a pay as you go security. The law is clear, just compensation must be paid or secured before the taking, that is "the Declaration of Takings". The law does not provide to secure enough for only those who come forward to preliminarily object or make a claim for the damages. Whether or not all or none come forward with either preliminary objections or to make a claim for damages is not relative to the requirement that the compensation must be paid or secured. The relative factor with regard to the United States and Pennsylvania Constitutions and the Eminent Domain Code is the

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NOT PART OF) RATHER THAN IN AN EVIDENTIARY HEARING

The second issue in question is whether or not the sufficiency of a bond can be determined In Chambers with the presiding judges acting as the mediator **(that the pro se Petitioner was not present or part of)** rather than in an evidentiary hearing. The essence of the argument for this issue is that the sufficiency of the bond for the Declaration of Takings for the Economy Borough Municipal Authority's Phase II sewer project shall not be made by agreement.

There was an afternoon closed-door session between the presiding judges, the attorney's for the Condemnees and Condemnor and one pro se Condemnee after the October 11, 2003 morning session that the Petitioner was not part of. The Petitioner was not represented at the October 11, afternoon In Chambers Session. (R.R.87a.)

Notably, the trial judges acted as mediators in conflict with the Code of Judiciary Conduct at Canon 5 E. A Judge should not act as an arbitrator or mediator (RR.8a, RR 88a, and RR 95a). The judges asked each Condemnees' attorney and pro so Condemnee if $500,000.00 was sufficient to cover their claims. (R.R. 88a R.R. 108a).

Not all attorneys agreed. The judges determined that the $500,000.00 was sufficient to cover the claims presently before the court. (R.R.92a R.R. 95a) It was not based on the sum total of the property value of the nine hundred and fifty seven (957); condemnations rather, on the indolence of the Phase I Condemnees as admitted by the Condemnor Engineer. See Goncz Deposition, appendix L. Further, it was based on the Condemnor's Solicitor's estimate. (R.R. 73a)

The Condemnor's Solicitor testified that the Condemnees attorneys could only challenge the sufficiency of the bond for their particular and not for the sufficiency of the bond for the Phase II project. (R.R.73a)

If it were the trial court's premise that the Condemnees did not have standing to challenge the sufficiency of the Bond for the entire Phase II Sewer Project, then surely the Condemnees lacked standing to enter into an agreement as to the sufficiency of the Bond for the entire Phase II Project, therefore, the sufficiency of the Bond for the entire Phase II Sewer Project has yet to be disposed of, and the $500,000.00 was an amount to be dispersed among the preliminary objectors presently before the court.

It is well settled that in cases in which the sufficiency of the security is challenged by preliminary objection, the condemnee is entitled to a hearing and an opportunity to present evidence. *Faris Appeal,* 435, Pa. 55, 254 A.2d 653 (1969).

Determining the sufficiency and/or form of the security in a settlement conference (that the Petitioner were not a part of) rather than through an evidentiary hearing is in contravention of caselaw and the decision of the court to the contrary constitutes a gross and reversible error.

III. THE COURT BELOW ERRED IN DETERMINING WHETHER OR NOT THE PETITIONER'S PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHT WERE VIOLATED WHEN THE TRIAL COURT FAILED TO ALLOW THE PETITIONER TO PRESENT ADDITIONAL EVIDENCE TO THE SECURITY OF THE BOND PURSUANT TO THE TRIAL COURT'S OCTOBER 29TH, 2002 ORDER.

The third question presented is whether or not the Petitioner's due process rights were violated when the trial court failed to allow the Petitioner to present additional evidence to the security of the bond pursuant to the trial court's October 29th, 2002 Order. Appendix D attached. Simply put, although the trial court's October 29th, 2002 Order allowed for the presentation of additional evidence and or argument relevant to the Petitioner's Preliminary Objections, the trial court did not

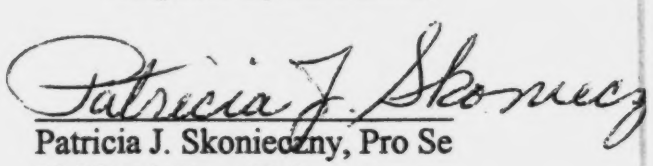
allow the Petitioner to refute hearsay evidence (the Sky Bank Letter) objected to, and denied Petitioner's request for a continuance in order to properly subpoena the author of the Sky Bank letter or to question the Authority's solicitor who offered said evidence. (R.R. 112a-118a) (R.R.128a –132a)

The Appellate Court affirmation of the Lower Court's decision to allow a copy of an unauthenticated and unverified letter to be entered into evidence over the objection of the opposing party is in contravention of Rules of Evidence and the lower court's denial of Petitioner's request for continuance pursuant to Pa. R.C.P. 216 (A) (3), for the inability to subpoena the author of the Sky Bank letter was prejudicial to the Petitioner and the decision of the court to the contrary constitutes a gross and reversible error.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests that this Court grant this petition and issue of writ of certiorari to the Commonwealth Court of Pennsylvania.

Respectfully submitted,



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VERIFICATION

I, Patricia J. Skonieczny, Condemnee herein, deposes and says, subject to the penalties of 18 PA. C.S.A. §4904, relating to unsworn falsification to authorities, that the facts set forth in the foregoing "Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania" are true and correct to the best of my knowledge, information and belief.

Dated: July 262004

Patricia J. Skonieczny

Patricia J. Skonieczny

Sept. 30, 2004

Patricia Skonieczny

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2005

PATRICIA J. SKONIECZNY,

Petitioner

vs.

In Re: CONDEMNATION BY THE ECONOMY BOROUGH MUNICIPAL AUTHORITY of: rights-of-way and easements of certain land situate in the Borough of Economy, for the purpose of the Phase II Project.

Respondent

APPENDIX

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IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

IN RE: CONDEMNATION BY THE ECONOMY MUNICIPAL AUTHORITY OF RIGHTS-OF-WAY AND EASEMENTS OF CERTAIN LAND SITUATE IN THE BOROUGH OF ECONOMY, FOR THE PHASE II PROJECT AND IN PARTICULAR AFFECTING PROPERTY OWNED BY: JAMES S. SKONIECZNY AND PATRICIA J. SKONIECZNY	:	No. 610 WAL 2003
PETITION OF: PATRICIA J. SKONIECZNY	:	Petition for Allowance of Appeal from the Order of the Common-wealth Court

ORDER

Per Curiam

AND NOW, this 27th day of April, 2004, the Petition for Allowance of Appeal is hereby DENIED.

A True Copy Patricia Nicola
As of: April 27, 2004
Attest: /s/_____
Patricia Nicola
Chief Clerk
Supreme Court of Pennsylvania

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: CONDEMNATION BY THE ECONOMY MUNICIPAL AUTHORITY of rights-of-way and easements of certain land situate in the Borough of Economy, for the purpose of the Phase II Project and in particular affecting property owned by:	:	No. 141 C.D. 2003
James S. Skonieczny and Patricia J. Skonieczny	:	
Appeal of Patricia J. Skonieczny	:	

ORDER

AND NOW, this 24th day of October 2003, the order of the Court of Common Pleas of Beaver County dated December 17, 2002 in the above captioned matter is hereby affirmed.

/s/_____
Mary Hannah Leavitt, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: Condemnation by the Economy Borough Municipal Authority of rights-of-way and easements of certain land situate in the Borough of Economy, for the purpose of the Phase II Project and in particular affecting property owned by:	:	No. 141 C.D. 2003
	:	Submitted: June 20, 2003
James S. Skonieczny and Patricia J. Skonieczny		
Appeal of: Patricia J. Skonieczny		

BEFORE: HONORABLE DORIS A. SMITH-RIBNER, Judge
HONORABLE MARY HANNAH-LEAVITT, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

OPINION
BY JUDGE LEAVITT FILED: October, 24, 2003

James S. Skonieczny and Patricia J. Skonieczny (Condemnees) appeal from an order of the Court of Common Pleas of Beaver Cournty (trial court) dismissing their preliminary objections to the declaration of taking filed by the Economy Borough Municipal Authority (Authority). We affirm.

HISTORY OF THE CASE

On April 18, 2003, the Authority passed Resolution No. 2002-54 (Resolution) authorizing it to condemn property in connection with a sewerage project. It approved

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Condemnees' property, and a bond. The bond provided, in pertinent part, as follows:

> NOW, THE CONDITION OF THIS OBLIGATION IS SUCH THAT, if the . . . Authority shall pay or cause to be paid to whomsoever may be a party with a compensable interest in property described in Paragraph 2., of the Declaration of Taking, filed at the above case number hereof, as Obligees, their certain attorneys, heirs, devisees or assigns, such amount of damages as each shall be entitled to receive for the entering upon and/or taking or appropriating by the . . . Authority of property after such damages shall have been agreed upon by the parties or assessed in the manner provided by law . . .

S.R. 10b

Notice of the condemnation was subsequently served on Condemnees on July 25, 2002. The Notice, among other things, reiterated the purpose of the condemnation, described the nature of the taking as "a right –of-way and easement" and stated that "[j]ust compensation for the taking . . . shall be paid from a Bond to the Commonwealth of Pennsylvania filed May 9, 2002, at the Beaver County Prothonotary's Office. The condition of said Bond shall be that the Condemnor shall pay such damages as shall be determined by law." R.R.12a.

On August 26, 2002, Condemnees filed preliminary objections to the declaration of taking on the ground that the bond filed with the declaration "is naked, inadequate, insufficient, valueless, without approval of the Court, as a result thereof, is violative of Article 1, Section 10 and Article XVI, Section 8 of the Pennsylvania Constitution and the Fifth Amendment to the United States Constitution." S.R. 12b. Condemnees also complained, albeit somewhat ambiguously, about future cots and fees, potential rate increases, and the financial feasibility of the Phase II Project, generally.

The Authority answered the preliminary objections, acknowledging that the unsecured bond "may not provide sufficient security in the event that it is determined that Condemnees are entitled to just compensation," and that just compensation for the temporary construction easement across Condemnees' property is no greater than $250.00. S.R. 19b-20b. The Authority also asserted that Condemnees' remaining averments failed to state a preliminary objection allowable under Section 406 (a) of the Eminent Domain Code (Code).[2]

On October 11, 2002, Senior Judge James E. Rowley and Judge C. Gus Kwidis convened the first hearing in the trial court on the multiple preliminary objections filed to the various declarations of taking in conjunction with the Phase II Project. At the hearing, Joseph M. Stanichak, counsel for the Condemnees and other individuals affected by the takings, and John f. Salopek, counsel for the Authority, presented a joint motion for a continuance on Condemnees' preliminary objections. Their exchange with the trial court was as follows:

> Mr. Salopek: Well, Your Honor, as Mr. Stanichak indicated, [Condemnees'] case was the last one that came in from his office, and I hadn't filed an Answer. It was prepared and in my file, but finally this morning – I mean, if you want to go ahead and proceed, ;I have an Answer. There's testimony in the Deposition in regard to the reasonableness of the taking of [Condemnees'] property. If you would want to move forward today, we can. If you want to continue, we can. The only issue is whether or not I filed a timely Answer.

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[2] Section 406(a) of the Code, act of June 22, 1964, special Sess., P.L. 84, *as amended*, 26 P.S.§1-406(a), provides in pertinent part:

> Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking. Failure to raise these matters by preliminary objections shall constitute a waiver thereof.

Judge Rowley: What I am trying to determine: Do you feel at this point that you have any reason to want to present any more evidence?

Mr. Salopek: On [Condemnees'] matter I don't' think there would be any necessity to.

Judge Rowley: Do you intend to present any evidence that's relevant and material to these four matters that the Legislature has said the Court can consider in this particular case [set forth in Section 406(a) of the Code], your clients case in this individual matter?

Mr. Stanichak: Yes. The information that I have is to the effect that there is not a proper easement, that Economy, that the . . . Authority did not have sufficient reason because of the certain underlying matters in the Deeds to proceed.

Judge Rowley: Well, those are matters of record then. The Deeds are on record.

Mr. Stanichak: Yes.

Judge Rowley: All right. Anything else that you would present? That is it?

Mr. Stanichak: Specifically, in addition to the normal, in addition to the other issues that I have raised in the other preliminary objections there, they are almost generic, really.
Judge Rowley: Well, then we will take the Answer . . .

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> Judge Rowley: Very well. In the matter at Docket No. 10820, In Rem Y28, James S. Skonieczny and Patricia J. Skonieczny, it's ordered that Counsel may file briefs on or before October 21, 2002. There will be no further hearing for the purpose of presenting evidence.

R.R. 47a-49a.

Throughout the morning, testimony was presented[3] regarding the sufficiency of the security posted by the Authority with respect to the 31 existing claims, as well as possible future claims. At the conclusion of the testimony, the hearing was recessed to give all counsel an opportunity to arrive at a figure that was "fair not only in terms of protecting those people whose property has been condemned but also the taxpayers of Borough of Economy." R.R. 83a. During the recess, Condemnees fired their counsel.

After the recess, the parties reconvened in Judge Kwidis' chambers. Condemnees, who were no longer represented by counsel, were not present. At the conclusion of the discussion, the trial court ordered the Authority to:

> post a $500,000 cash bond with the understanding that that cash bond is for those cases that are presently filed and that the Court will entertain a future motion by any condemnee in this case in the event that there are subsequent cases filed that exceed 31. And we are using that because Judge Rowley and I do not believe it is an arbitrary amount in the sense that there has been some experience with Phase I in this project on how many claims were filed and how many were litigated.

R.R. 95a-96a. Judge Kwidis subsequently clarified that it would be acceptable for the Authority to establish an account at Sky Bank that

[3] Deposition testimony was also admitted into the record on the morning of October 11, 2002.

would pay the Authority interest and be "subject to no withdrawals without a Court Order." R.R. 101a. He explained:

> The question then will be for those people involved in this case to monitor the case to determine how fast this fund is being dissipated in terms of the number of claims that are outstanding. That's why we are convinced that by leaving it open and subject to modification, everyone will be protected.

R.R. 101 a.

A hearing on Condemnees' preliminary objections was held on December 4, 2002, at which Condemnee Patricia Skonieczny appeared *pro se*. At the hearing, the Authority introduced a letter from Sky Bank to the Authority verifying "that $500,000 deposit account . . . has been established as the Phase II Condemnation Damages Security Account as directed by the Court of Common Pleas of Beaver County for the Phase II Project. Such account has been designated as 'withdrawal by court order only.'" R.R. 20a. Ms. Skonieczny objected to the letter on the ground that it was not properly authenticated. The trial court overruled the objection and, ultimately, dismissed the preliminary objections on the grounds that the security posted was sufficient and the remaining objections raised by Condemnees were not cognizable under Section 406(a) of the Code and were matters more appropriately presented in a utility rate proceeding. This appeal followed.[4]

On appeal, Condemnees raise several issues for our review: (1) whether the Authority's Resolution an bond adequately address the interest taken in Condemnees' property; (2) whether the security posted by the Authority was sufficient; (3) whether the trial court abused its discretion or committed an error of law in determining the sufficiency of

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[4] Our review of the trial court's order dismissing Condemnees' preliminary objections is limited to determining whether the trial court abused its discretion or committed an error of law. *In re Condemnation by Penn Township, York County, of Right-of-Way and Easements Over, Across and Through Tracts of Land Located in Penn Township, York County*, 702 A.2d 614, 616 (Pa. Cmwlth. 1997).

the bond in a conference that Condemnees were not a part of, rather than in an evidentiary hearing; (4) whether the letter from Sky Bank to the Authority verifying the establishment of the Phase II Condemnation Damages Security Account was admissible; (5) whether the Authority obtained the financing for the Phase II Project by fraudulent means. Because the first and fifth issues were not raised in Condemnees' preliminary objections, we find they have been waived. *See, e.g., Benek v. Pennsylvania Game Commission*, 411 A.2d 267, 269 (Pa. Comwlth. 1980) ("Our Court has consistently enforced the provisions of Section 406 and has held on several occasions that issues which may be raised by preliminary objection must be raised in that manner or they are waived.") Further, even if the first and fifth issues had been raised, they are not proper preliminary objections under Section 406(a) of the Code. We address the remaining issues *seriatim.*

SUFFICIENCY OF THE SECURITY

Condemnees argue, first, that the security posted by the Authority was not sufficient. Section 403 of the Code prescribes requirements for the furnishing of security in all condemnation proceedings which are subject to the Code. Under Section 403, every condemnor, with the exception of those having the power of taxation,[5] must give security to effect the condemnation,

> by filing with the declaration of taking its bond, without surety, to the Commonwealth of Pennsylvania for the use of the owner or owners of the property interests condemned, the condition of which shall be that the condemnor shall pay such damages as shall be determined by law.

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[5] Section 403(b) of the Code provide that:

> Where a condemnor has the power of taxation, it shall not be required to file a bond with the declaration of taking. The funds raised, or lawful to be raised, by the power of taxation of the condemnor shall be pledged and are hereby made security for the payment of the damages as shall be determined by law.

26 P.S. §1-403(b).

Section 403(a) of the Code, 26 P. S. §1-4039a). The Comment of the Joint State Government Commission to Section 403(a) of the Code explains that "[i]t is intended by this subsection that the bond filed shall be an open end bond." Thus, the Code does not contemplate that the condemnor's bond shall be in some fixed amount. Rather, the bond satisfies the requirements of Section 403 if it specifies that the condemnor shall pay such damages as shall be determined by law.

The practice of filing such bonds in an indeterminate or unlimited amount has long been upheld by our courts. *See, Illig. V. Chartiers Southern Railway Co.*,268 Pa. 476, 469, 112 A. 116, 117 (1920) (approving the practice of filing open end bonds in condemnation proceedings); *In re: Tasa Coal Co. Condemnation,* 30 Beaver County Legal Journal 28, 30 (1969) (ordering "that the condemnor file a bond in an unlimited sum, the condition of which shall be that the condemnor shall pay such damages as shall be determined by law"); *Philadelphia Electric Co. V. Janney,* 31 Delaware County Reports 412, 423 (1943) (observing that the practice of filing condemnation bonds conditioned in an indeterminate amount "is entirely regular and that the form of the bonds as submitted should be approved"). Further, as our Supreme Court has explained, an open end bond may provide greater protection for the condemnee:

a bond with sufficient security, unlimited in amount, is better for the landowner than one in which the liability of the surety is limited, for he is entitled to recover from the principal in every such bond the amount of damages sustained, without regard to the limited liability of the surety. The [landowner] has the protection of a bond which will require the surety, as well as the principal, to pay him whatever damages he has sustained.

Illig. 268 Pa. at 469, 112 A. at 117.

On the other hand, an unsecured bond may not be adequate. Accordingly, Section 403(c) of the Code provides that:

The court, upon preliminary objections of the condemnee under and within the time set forth in section 406(a), may require the condemnor to give such bond and security as the court deems proper, if it shall appear to the court that the bond or power of taxation of the condemnor is not sufficient security.

26 P. S. §1-403(c). Such is often the case when the condemnor is a municipal authority or other entity that does not by itself possess the power of taxation. *See e.g., Tasa Coal Co.*, 30 Beaver County Legal Journal at 29.

Here, the Authority followed the correct procedure and filed a bond with its declaration of taking that was conditioned upon the Authority paying such damages as shall be determined by law. Pursuant to Section 403(c) of the Code, the trial court determined that the Authority's proposed unsecured bond was not adequate and required the Authority to post sufficient security, specifically, a $500,000 deposit account designated as "withdrawal by court order only." Condemnees presented absolutely no evidence to show that this was not sufficient security to cover the temporary construction easement across their property.

Under these circumstances, we find that the trial court did not abuse its discretion or commit an error of law in dismissing the Condemnees' preliminary objection regarding the sufficiency of the security posted.

HEARING

Condemnees further argue that the trial court abused its discretion or committed an error of law in determining the sufficiency of the bond in a conference that Condemnees were not a part of, rather than in an evidentiary hearing. Where an objection to the sufficiency of the bond is raised, the trial judge should not dismiss the objection without requiring an answer and holding a hearing. *Faris Appeal*, 435 Pa. 55, 254 A.2d 653 (1969). For the reasons that follow, we find the trial court satisfied this obligation.

First, it is evident from Judge Rowley's exchange with Messrs. Stanichak and Salopek that the trial court received an answer to Condemnees' preliminary objection regarding the sufficiency of the security posted by the Authority. R.R. 48a-49a, S.R. 19b-21b. Further, the record reflects that Condemnees actually participated in two hearings: Mr. Stanichak appeared on Condemnees' behalf at the hearing that took place on the morning of October 11, 2002, at which live and deposition testimony was accepted into the record regarding the sufficiency of the security posted by the Authority; and Ms. Skonieczny appeared before the trial court *pro se* on December 4, 2002, at a hearing specifically dedicated to Condemnees' preliminary objections.

Significantly, the amount of security ordered by the trial court during the conference in Judge Kwidis' chambers on the afternoon of October 11, 2002 was based upon the testimony received into the record during the hearing that took place that morning, at which Condemnees were represented by counsel. At that hearing, Mr. Stanichak represented that all of the evidence Condemnees needed to present with respect to their preliminary objections was of record. R.R, 47a-49a. The conference in chambers did not adduce evidence; in effect, it was a settlement conference. In any case, Condemnees got a second chance to present evidence on December 4, l2002, but they failed to show why the security was inadequate in accordance with their burden.

For these reasons, we find that the trial court satisfied its obligation under *Faris Appeal.*

SKY BANK LETTER

Condemnees' final contention is that the letter from Sky bank to the Authority verifying the establishment of the Phase ll Condemnation Damages Security Account was inadmissible because it was not properly authenticated by someone from the bank. We find that whether or not the letter was admitted into evidence was irrelevant to the matter before the trial court on December 4, 2002, namely, whether the Authority posted sufficient security.

Counsel for the Authority presumably offered the letter to demonstrate compliance with the trial court's previous order that the Authority posted additional security pursuant to Section 403(c) of the Code. Compliance with the previous order, however, was not the issue before the trial court. Indeed, the trial court was satisfied that the Authority had complied with its order. If Condemnees believed otherwise, they should have initiated contempt proceedings against the Authority.

At the December 4, 2002 hearing, it was Condemnees' burden to show that the security posted by the Authority was insufficient; Condemnees offered no evidence whatsoever on this subject. Accordingly, whether or not the letter was admitted into evidence was immaterial.

CONCLUSION

For these reason, we affirm the trial court's dismissal of Condemnees' preliminary objections.

/s/_____
MARY HANNAH LEAVITT, Judge

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY, PENNSYLVANIA

CIVIL DIVISION – LAW

IN RE: Condemnation by the ECONOMY BOROUGH MUNICIPAL AUTHORITY of rights-of-way and easements of certain land situate in the Borough of Economy, for the purpose of the Phase II Project and in particular affecting property owned by:	:	No. 10820 of 2002
JAMES S. SKONIECZNY and PATRICIA J.SKONIECZNY	:	Eminent Domain Y28

ORDER

NOW, THIS 17TH DAY OF December, 2002, after hearing, the Condemnor, Economy Borough Municipal Authority, having filed adequate security pursuant to the Court's Order of October 11, 2002, no evidence of bad faith on the part of Economy Borough Municipal Authority having been presented, and the issue presented at the hearing not being properly raised by Preliminary Objections, (26 P.S. §1-406 (a)), it is now ORDERED and DIRECTED that the Preliminary Objections filed by the Condemnees above captioned, to the declaration of taking filed by the Condemnor, be and they are hereby dismissed.

BY THE COURT
/s/_____
James E. Rowley S.J.

PUBLISHER'S NOTE

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presented, either by deposition, testimony or otherwise, the objections filed by these Condemnees were overruled.

One objection, common to all of the Condemnees objecting, was that EBMA's bond did not provide sufficient or adequate security. The initial hearing in this matter was held on October 11, 2002 to consider the initial issue of security. Following the presentation of evidence, by way of deposition and testimony and a conference held by counsel for all of the objectors present, the Court entered an Order directing that the Condemnor file $500,000,00 with Sky Bank in order to secure the objector's right to compensation. No monies were to be withdrawn from the account except by order of Court. The Authority also was to report monthly to the parties interested. EBMA has complied with the Court's Order and we are of the opinion, based on all of the evidence, that there is sufficient and adequate security for the bond to protect the property owners.

Subsequently, a hearing was held for these Condemnees to consider the remaining objections filed by them. Initially, it is important to note that there is, in these proceedings a presumption that the Authority performed their responsibilities in good faith. There is a heavy burden on the Condemnee who challenges the Authority's exercise of the power granted to establish that the Authority abused its discretion by acting fraudulently, arbitrarily, capriciously or in bad faith. The Condemnees bare assertions to the contrary, without credible evidentiary support, are insufficient for us to conclude that the Authority acted inappropriately. The mere fact that there is a possibility of other options than those taken by the Authority does not meet that burden or overcome the presumption. In this case, the credible evidence viewed in its entirety shows that the Condemnees have failed to meet their burden and that the Authority acted in good faith and in accordance with all constitutional and statutory requirements.

One, if not the primary challenge by the Condemnees, is the existence of a inter-municipal service agreement between EBMA and New Sewickley Township. The thrust of Condemnees argument, as we understand it, is that the anticipated rates to be charged by EBMA will not be favorable to the Condemnees as compared to those paid by residents who are customers of the New Sewickley Township system. However, that claim is not an issue cognizable under preliminary

objections to a declaration of taking. Rather, it is a matter more appropriately presented in a rate proceeding.

It is for all of these reasons that the Condemnees' preliminary objections were overruled.

BY THE COURT

/s/_____
James E. Rowley S.J.

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY, PENNSYLVANIA
CIVIL ACTION – LAW

IN RE: Condemnation by the	:	
ECONOMY BOROUGH AUTHORITY	:	No. 10820 of 2002
of rights-of way and easements of	:	
certain land situate in the Borough of	:	
Economy, for the purposes of the	:	
Phase II Project and in particular	:	
Affecting property owned by:	:	Eminent Domain
		Y28
James S. Skonieczny and		
Patricia J. Skonieczny:		

ORDER

NOW, October 29th, 2002, further hearing and the presentation of additional evidence and or argument relevant to the Preliminary Objections filed in the above entitled case is set for Wednesday, December 4, 2002, at 2:30 o'clock p.m., in the Court House at Beaver, PA. The Court Room is to be scheduled by the Beaver County Court Administrator. All evidence received at the previous hearing held on October 11, 2002 is received and made a part of the record in this case.

BY THE COURT

/s/_____
James E. Rowley, S.J.

IN THE COURT OF COMMON PLEAS OF BEAVER COUNTY, PENNSYLVANIA

CIVIL ACTION – LAW

IN RE: Condemnation by the Economy	:	No.10789 of 2002
Borough Municipal Authority	:	No. 10798 of 2002
of rights-of-way and easements	:	No. 10820 of 2002
of certain land situate in the	:	No. 10832 of 2002
Borough of Economy, for the	:	No. 10833 of 2002
purpose of the Phase II Project	:	No. 10835 of 2002

ORDER

AND NOW, this 11th day of October, 2002, after Hearing on the presentation of additional evidence concerning the issue of security raised by the Condemnees in the above captioned cases, it is hereby ORDERED and DIRECTED that the Economy Borough Municipal Authority shall post as security for Phase II and the claims that have been filed to date by the Condemnees the sum of Five Hundred Thousand ($5000,000) Dollars with Sky Bank that cannot be withdrawn without proper authorization through Order of Court.

It is further ORDERED and DIRECTED that the parties shall monitor the security as to future claims and settlements and be permitted to Petition the Court for any appropriate modification or adjustment of said cash security during the pendency of this sewer project.

BY THE COURT

/s/_____
C. Gus Kwidis, Judge

/s/_____
James E. Rowley, Senior Judge